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In the

Supreme Court of the United States

October Term, 1963

No. 509

UNITED STATES OF AMERICA, *Petitioner*

vs.

VERMONT, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE STATE OF VERMONT

OPINIONS BELOW

The opinion of the District Court (R. 19-27) is reported at 206 E. Supp. 951. The opinion of the Court of Appeals (R. 29-43) is reported at 317 F. 2d 446.

JURISDICTION

The judgment of the Court of Appeals was entered on May 9, 1963 (R. 44). On July 3, 1963, the Court of Appeals (1) granted a motion of the United States for leave to file a petition for rehearing out of time (R. 44-45), and (2) denied the petition (R. 46-57, 58). The petition for a writ of certiorari was filed on September 30, 1963, and was granted on December 9, 1963 (R. 58; 375 U. S. 940). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the Internal Revenue Code of 1954 and the Vermont Statutes Annotated and of the Constitution of the United States are set forth in the Appendix, *infra*.

QUESTION PRESENTED

Whether a tax lien of the State of Vermont, being identical to the federal tax lien, has priority over the later arising federal lien?

STATEMENT

On October 21, 1958, the defendant, Cutting & Trimming, Inc., filed a withholding tax return with the Vermont Tax Department reporting that it had withheld from the wages of its employees for the third quarter, 1958, State income taxes in the amount of $1,628.15. This sum was not paid to the Tax Department (R. 18). Thereafter, on the same date, the Commissioner of Taxes for Vermont made an assessment and demand on Cutting & Trimming, Inc. in the amount of $1,628.15. On October 30, 1958, a notice of tax lien was filed in the Burlington City Clerk's office for the unpaid taxes (R. 17). On May 21, 1959, the State of Vermont brought suit to enforce its lien against Cutting & Trimming, Inc., the Chittenden Trust Company being joined as trustee and served with a writ on May 25, 1959 (R. 10, 13, 17). The trustee filed a disclosure showing it held $1,278.82 as trustee of Cutting & Trimming, Inc., another $600 having been previously

attached by Rainbow Children's Dress Company (R. 10, 11, 13, 31). On October 23, 1959, judgment was entered by Chittenden County Court for Vermont against Cutting & Trimming for $4,049.22 and against the defendant Chittenden Trust Company in the amount of $1,278.82 (R. 11, 31). (The $4,049.22 included other tax assessments not here relevant.)

32 VSA 5765 provides that if any employer required to withhold taxes from an employee's wages "neglects or refuses to pay the same after demand, the amount, including interest after such demand, together with any costs that may accrue in addition thereto, shall be a lien in favor of the State of Vermont upon all property and rights to property, whether real or personal, belonging to such employer. Such lien shall arise at the time the assessment and demand is made by the commissioner of taxes and shall continue until the liability for such sum, with interest and costs, is satisfied or becomes unenforceable. Such lien shall be valid as against any subsequent mortgagee, pledgee, purchaser or judgment creditor when notice of such lien and the sum due has been filed by the commissioner of taxes with the clerk of the town or city in which the property subject to the lien is situated, * * *."

On February 6, 1959, the Commissioner of Internal Revenue made assessments for outstanding 1958 federal taxes in the amount of $5,365.96 against Cutting & Trimming. The taxes arose under the Federal Unemployment Tax Act (R. 6, 31). A notice of lien was filed on or about June 2, 1959. In 1961 the United States brought the present action in the United States District Court against Cutting & Trimming, the State of Vermont and others to establish Cutting & Trimming's tax liability and to foreclose its tax lien against the property of Cutting & Trimming held by the trustee company (R. 5-8).

The defendant Chittenden Trust Company, in its answer, stated that it had $1,878.82 in its possession for distribution to the proper parties (R. 13).

The answer of the State of Vermont alleged that the October 21, 1958 assessment gave its lien priority over the federal lien (R. 8-12, 17, 18). On the United States' motion for judgment on the pleadings (R. 14-16), the District Court held that the State of Vermont's tax lien had priority over the federal lien and ordered the trust company to apply the $1,878.82 first to the payment of principal and interest on the State's tax lien and to pay the balance to the United States (R. 19-27).

The United States Court of Appeals, Second Circuit, affirmed the judgment of the District Court on May 9, 1963 (R. 44). The Court of Appeals held that under *United States* v. *City of New Britain* (1954), 347 U. S. 81, the same test of choateness which had been formulated by the courts in insolvency cases did not apply to cases where no insolvency was involved. It held that since the Vermont statute created a lien which was identical to the federal lien and which was, under the *New Britain* case, as general or specific as the federal lien, the same standards applied and that the cardinal principle of "first in time, first in right" was applicable. Thus, the Vermont tax lien had priority over the federal lien (R. 33-43).

SUMMARY OF ARGUMENT

The issue is whether a state tax lien, identical to the federal tax lien and prior in time, has priority. Although the Court has heretofore taken the position that the question of the relative priority of a federal tax lien and a competing statutory lien is governed by federal law, *United States* v. *Security Trust & Savings Bank* (1950), 340 U. S. 47, this position should be re-examined. The Court has applied state law in determining the extent of the "property and rights to property" to which a government lien attaches. *United States* v. *Durham Lumber Company, et al.* (1960), 363 U. S. 522. If the Court is willing to apply state law in order to determine whether the taxpayer has any property at all to which a government lien can attach, it should be willing to apply state law to determine whether an earlier arising lien on the taxpayer's property has given the lienor a property interest.

Even in applying the federal rules of priority, the tax lien of the State of Vermont must prevail in this case. Since no priority is conferred by statute on the federal tax lien, resort to the general lien law must be had. The cardinal rule is that the lien which is "first in time" is "first in right." The Court has also said that a lien must be choate. The lien of the State of Vermont and the lien of the United States are identical as to the time they arose, their duration, the property to which they attach and the method of enforcement. The federal tax lien has been held to be choate and so must be the State's lien, also.

The standards of choateness developed in insolvency cases are not applicable under the federal tax lien statute where no in-

solvency is involved. The differences in the historical background and statutory language of 26 U.S.C. 6321 and 31 U.S.C. 191 indicate that a different treatment is to be accorded the two types of cases. Furthermore, the Court in *United States* v. *City of New Britain* (1954), 347 U. S. 81, distinguished the treatment to be given to insolvency and non-insolvency cases.

None of the cases decided by this Court have decided the precise issue here. The insolvency cases are not applicable, as indicated heretofore. Distinguishable also are the attachment cases, the garnishment cases and the mechanics' lien cases, for contingencies can arise between the time the lien arises and the time judgment is obtained which make the fact and amount of the lien uncertain. Nor are the cases involving a circuity problem, such as *United States* v. *Buffalo Savings Bank* (1963), 371 U. S. 228, applicable. Also, the cases holding that an assignee's or mortgagee's lien to secure future indebtedness of the taxpayer is subordinate to a federal tax lien intervening prior to the incurring of the liability are not in point. *United States* v. *Ball* (1958), 355 U. S. 587; *United States* v. *Pioneer American Insurance Company* (1963), 374 U. S. 84.

The State's lien was first at every stage of the proceeding. The State assessed first, filed a lien notice first and brought suit first. The identity of the lienor and the amount of the lien were established; the property subject to the lien was as defined as that subject to the federal lien. Under these circumstances, the long established principle of "first in time, first in right" applies and Vermont's lien should be given priority. In the absence of an express declaration by Congress, neither the revenue needs of the federal government, nor the desire for uniformity, require the imposition of an unjustifiable double standard which would arbitrarily frustrate the State of Vermont in the collection of its revenues.

ARGUMENT

A STATE TAX LIEN WHICH IS IDENTICAL TO THE FEDERAL TAX LIEN AND WHICH ARISES EARLIER HAS PRIORITY WHERE THE TAXPAYER IS NOT INSOLVENT.

The Rule That It Is a Matter of Federal Law As to When a Lien Created by State Law "Has Acquired Sufficient Substance * * * As to Defeat a Later Arising Federal Tax Lien" Should no Longer be Followed.

The Court has generally taken the view that the question of the relative priority of a federal tax lien and a competing statutory lien is governed by federal law. *United States* v. *Security Trust and Savings Bank* (1950), 340 U. S. 47; *United States* v. *City of New Britain* (1954), 347 U. S. 81; *United States* v. *Pioneer American Insurance Company* (1963), 374 U. S. 84. The rule developed in the early cases and apparently went unchallenged before the Court for many years. Recently the Court has paid heed to state law under some circumstances.

> "Yet because federal liens intrude upon relationships traditionally governed by state law, it is inevitable that the court in developing the federal law defining the incidents of such liens, should often be called upon to determine whether, as a matter of federal policy, local policy should be adopted as the governing federal law, or whether a uniform nationwide rule should be formulated."
>
> *United States* v. *Brosnan* (1960), 363 U. S. 237, 240.

In *Brosnan* the Court adopted as federal law state law "governing the divestiture of federal tax liens." *Supra*, p. 241.

The Court has also applied state law in determining the extent of the "property and rights to property" to which a government lien attaches. *United States* v. *Bess* (1958), 357 U. S. 51, 55; *United States* v. *Durham Lumber Company, et al.* (1960), 363 U. S. 522; *Aquilino* v. *United States* (1960), 363 U. S. 509.

The federal statutes provide for a tax lien for unpaid federal withholding taxes but the statute is silent on the matter of priority. There is no requirement in the federal statutes that a state-created lien must be choate or perfected in some way to prevail over a federal tax lien. In developing such rules, the Court has apparently taken the view that there is some federal

common law governing priorities. Such a view might have been correct at the time the rule of choateness developed. See *Spokane County* v. *United States* (1929), 279 U. S. 80; *New York* v. *Maclay* (1932), 288 U. S. 290. Such a rule would seem to be no longer applicable in view of the cases which have held there is no federal common law. *Erie Railroad Company* v. *Tompkins* (1938), 304 U. S. 64; *Wheelden* v. *Wheeler* (1963), 373 U. S. 647. The Court has applied federal common law in very limited circumstances. See *Clearfield Trust Company* v. *United States* (1943), 318 U. S. 363.

The Court apparently is willing to apply state law to determine whether the taxpayer has any property at all to which a government lien can attach; *United States* v. *Bess, supra; United States* v. *Durham Lumber Company, et al., supra; Aquilino* v. *United States, supra;* but thus far has been unwilling to apply state law to determine whether the taxpayer's property interest has been diminished by the attachment of a statutory lien. When the taxpayer has some interest in the property, the Court has said the federal tax lien statute creates no property rights but merely "attaches legal consequences federally defined." *Aquilino* v. *United States, supra,* p. 513; *United States* v. *Bess, supra,* p. 55.

The United States argues that the same considerations which led the Court to look to state law in the *Brosman* case are inapplicable here. It should be evident by now, however, that the rules applied by this Court in many cases in the interests of uniformity do displace "well established state procedures" governing the enforcement of competing property or lien interests. If the property interest of the taxpayer has been diminished by the attachment of a prior lien, it is difficult to see why the federal tax lien should attach to the property interest created by the earlier arising lien. A refusal to recognize the property interests created by the states might well infringe upon the Tenth Amendment to the Constitution of the United States. In view of this, the federal courts should look to state law to determine whether a lien has created a property interest and apply state law in determining when a state-created lien becomes effective. Beyond that the only rule of priority which should be applied is the universal rule of "first in time, first in right."

Even Under Federal Rules, a State Tax Lien Which is Identical to The Federal Tax Lien and Which Arises Earlier Has Priority Where the Taxpayer is Not Insolvent.

Even if the determination of the priority of the federal tax lien is considered a federal question, the State of Vermont must prevail in this case.

The tax lien of Vermont arose under Title 32 V.S.A. 5765, while the United States claims a tax lien pursuant to 26 U.S.C. 6321-6322. Since the statutes are silent as to the relative priority of a federal tax lien and a competing lien, *United States* v. *City of New Britain* (1954), 347 U. S. 81, we must look to the cases to find the answer.

In the *New Britain* case, *supra*, the Court held that where no insolvency is involved, the priority of statutory liens is determined by the longstanding, universal principle of "first in time, first in right."

The Court in citing Chief Justice Marshall in *Rankin & Schotzell* v. *Scott* (1827), 12 Wheat. 177, said, at page 85:

> "We believe that priority of these statutory liens is determined by another principle of law, namely, 'the first in time is the first in right.' As stated by Chief Justice Marshall in *Rankin* v. *Scott, supra*:
>
> 'The principle is believed to be universal, that a prior lien gives a prior claim, which is entitled to prior satisfaction, out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a Court of law or equity to a subsequent claimant.' 12 Wheat., at p. 179.
>
> This principle is widely accepted and applied, in the absence of legislation to the contrary. * * * We think that Congress had this cardinal rule in mind when it enacted §3670, a schedule of priority not being set forth therein. Thus, the priority of each statutory lien contested here must depend on the time it attached to the property in question and became choate."

The declared purpose of the Vermont income tax law (which includes the withholding provisions) is "to conform as closely as may be with the internal revenue code * * *." Title 32 V.S.A. 5601.

A comparison of the two liens shows how well the declared purpose of conformity was carried out, for the liens are identical as to the property to which they attach, the time that they arise, their duration, and as to the method of enforcement.

The liens are "upon all the property and rights to property, whether real or personal" belonging to the taxpayer. Title 32 V.S.A. 5765; 26 U.S.C. 6321.

The State's lien arises "at the time assessment and demand is made by the commissioner of taxes and shall continue until the liability of such sum, with interest and costs, is satisfied, or becomes unenforceable." Section 5765, supra.

The lien of the United States arises "at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time." 26 U.S.C. 6322.

Court action was instituted by both the United States and Vermont to enforce their respective liens (R. 5-11, 31).

The State's lien took effect on October 21, 1958, the date the commissioner of taxes made an assessment and demand on Cutting and Trimming in the amount of $1,628.15 (R. 17). On October 30, 1958, a notice of tax lien was filed and on May 21, 1959, the State of Vermont brought suit to enforce its lien, the property in question being attached by trustee process on May 25, 1959 (R. 10, 13, 17, 31).

The lien of the United States took effect on February 6, 1959, the date an assessment for unpaid taxes was made by appellant (R. 6, 31). A notice of lien was filed on June 2, 1959, and in 1961, the United States brought suit to foreclose its tax lien (R. 5-8).

Thus, the lien of the State of Vermont was first in time not only as to the date of assessment when the respective liens took effect, but as to the time of filing notice and in bringing court action to enforce its lien.

The United States argues that the State lien fails to meet the standard of choateness which the Court has applied in determining priority.

In *New Britain*, the liens of the United States were for withholding and unemployment taxes and insurance contributions. The City of New Britain had a lien for real estate taxes. The Court found both liens to be perfected. The Court said:

> "The liens may also be perfected in the sense that there is nothing more to be done to have a choate lien—when the identity of the lienor, the property subject to the lien and the amount of the lien are established. The federal tax liens are general and, in the sense above indicated, perfected."

Here the identity of the lienor and the amount of the lien were established as of the date the Vermont assessment was made. The assessment was based on the unpaid withholding tax returns filed by Cutting and Trimming for the third quarter of 1958 (R. 17, 18, 30). The property subject to the lien was "all the property and rights to property, whether real or personal." Title 32 V.S.A. 5765. This included the Cutting and Trimming bank deposit in the Chittenden Trust Co. (R. 31).

The United States protests that the Vermont lien must attach to specific property in order to prime the federal lien.

In *Illinois* v. *Campbell* (1946), 329 U. S. 362, 372, an insolvency case, the Court held that the State lien could not defeat the federal priority because this requirement was not met. Later, in *United States* v. *Gilbert Associates* (1953), 345 U. S. 361, the Court held that where the town lien and federal lien were both general and the taxpayer was insolvent, Section 3466[1] (now 31 U.S.C. 191) awarded priority to the United States. Yet, in *New Britain*, *supra*, the Court indicated it made no difference whether one lien was specific and one general, at least as to real estate. As was said in *United States* v. *City of Greenville* (1941), 118 F. 2d 963, 965:

> "To say that the lien provided by this statute is a general lien on all the property of the taxpayer does not help in the solution of the problem presented, for a lien is not deprived of validity because it attaches to a number of pieces of property instead of to a single piece, nor is it for that reason to be subordinated to a junior lien attaching to a single piece of property."

Suffice it to say at this point that *Illinois* v. *Campbell* and *United States* v. *Gilbert Associates* were insolvency cases, a factor

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[1] "Whenever any person indebted to the United States is insolvent * * * the debts due the United States shall be first satisfied." 31 U.S.C. 191, formerly R.S. 3466.

which clearly distinguishes them from the present case, as was pointed out by the Court in *New Britain*. It is apparent that the same degree of perfection and specificity required in insolvency cases is not necessary when the taxpayer is solvent.

The property subject to the Vermont lien in this case was as much established and identified as was the property subject to the federal lien in *New Britain*. The similarity between the two liens being apparent, one can see that one lien is as specific and general as the other and as perfected. If the federal lien was perfected and choate in *New Britain*, and the Court said it was, Vermont's lien in this case is perfected and choate.

The Principles of Choateness Which the Court Has Applied in Insolvency Cases are Not Applicable Where No Insolvency Exists.

The priority of the United States is clearly set forth by statute in insolvency cases.

> "Whenever any person indebted to the United States is insolvent * * * the debts due to the United States shall be first satisfied; * * *."
>
> 31 U.S.C. 191.

Naturally, a stricter test is called for as to when a competing lienor can defeat the priority of the United States, when the statute by its terms confers such priority. There are no exceptions in the statutes and the rules about specific and perfected liens are implied exceptions to the statute.

This statute, formerly R. S. 3466, dates back to 1797, 1 Stat. 515. The question arose under Section 191 as to when property was that of the debtor from which the United States had to be first satisfied. Obviously, if title had passed from the debtor prior to insolvency, the crucial point, the priority of the United States could not reach it. Thus, the question became: To what extent must a debtor be divested of an interest in the property before the federal priority is lost?

> "Section 3466 mentions no exceptions to its requirement that 'the debts due to the United States shall be first satisfied.' It is nevertheless true that in several early decisions this Court read an exception into the section in the case of previously executed mortgages. *Thelusson* v. *Smith*,

> 2 Wheat. 396, 426; *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386; *Brent* v. *Bank of Washington*, 10 Pet. 596, 611, 612. This doctrine seems to have been based on the theory that mortgaged property passes to the mortgagee and is no longer a part of the estate of the mortgagor. See *Conard* v. *Atlantic Insurance Co., supra*, at 441-442. The question of whether the priority of the United States under §3466 would also be defeated by a specific and perfected lien upon property, whose title remained in the debtor was reserved in those cases."
>
> *United States* v. *Texas* (1941), 314 U. S. 480, 484.

More recently, the Court has indicated that on its face the statute is absolute and admits of no exceptions. *United States* v. *Waddill* (1941), 323 U. S. 353, 355.

In a number of cases, however, the Court has recognized that certain exceptions might be read into the statute, such as, a lien specific and perfected at the time of insolvency. *New York* v. *Maclay, supra., United States* v. *Texas, supra, United States* v. *Waddill, supra, Illinois* v. *Campbell, supra, United States* v. *Gilbert Associates, supra, United States* v. *Knott* (1936), 298 U. S. 544.

To this day, however, the State of Vermont knows of no case (at least since the early 19th Century) where this Court has found that a statutory lien prevailed over the federal priority under Section 191. Nevertheless, the Court developed the test of choateness in trying to ascertain whether competing liens avoided the sweeping provisions of the statute. *Spokane Co.* v. *United States, supra, New York* v. *Maclay, supra, United States* v. *Knott, supra, United States* v. *Texas, supra, Illinois* v. *Campbell, supra, United States* v. *Gilbert Associates, supra.*

A completely different picture is painted by the federal tax lien statutes for they say nothing about the priority of the United States as against similar but earlier tax liens of states. The federal tax lien statute, 26 U.S.C. 6321, was preceded by R. S. 3670, and dates back to 1865, 13 Stat. 470. In nearly one hundred years, these statutes have remained silent about federal priority and one would think that the only question which would arise then would be as to which lien was first in time.

Certainly, Congress would have given the United States priority if it considered it desirable to do so. By the Bankruptcy Act of 1867, 14 Stat. 517, establishing a uniform system of bank-

ruptcy throughout the United States, Congress provided for priority for debts due the United States. That Act read, in part, as follows, at page 531:

> "Sec. 28. * * * In the order for a dividend, under this section, the following claims shall be entitled to priority or preference, and to be first paid in full in the following order:
>
> First. The fees, costs, and expenses of suits, and the several proceedings in bankruptcy under this act, and for the custody of property, as herein provided.
>
> Second. *All debts due to the United States, and all taxes and assessments under the laws thereof.*
>
> Third. All debts due to the State in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws of such State. * * * "
>
> (Emphasis supplied.)

As further evidence that Congress needed no help from the Courts in giving the United States priority when deemed desirable, note 26 U.S.C. 5004. That section, dating back to 1868, 15 Stat. 125, imposes a "first lien" in favor of the United States on the property to which it attaches from the time distilled spirits "are in existence as such until * * * such tax is paid."

In the light of the historical background and the difference in statutory language, it is clear that different treatment is to be accorded insolvency cases from those where no insolvency exists. Obviously, stricter rules should be applied under the insolvency statute and there is no justification for applying the choateness doctrine in a non-insolvency case in the absence of an express declaration by the Congress.

Thus, the universal principle of "first in time, first in right" is applicable.

In *United States* v. *Bradley* (1963), 321 F. 2d 224, the Court refused to apply choateness tests of insolvency cases to a distribution in bankruptcy.

The original bankruptcy statute was amended in 1898, 30 Stat. 563, so that state and local taxes were given the same status as tax claims of the United States. At the present time, 11 U.S.C. 104, providing for priority of debts in bankruptcy reads in part as follows:

"* * * (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof: * * *"

11 U.S.C. 107(b) reads, in part, as follows:

"* * * and statutory liens for taxes and debts owing to the United States or to any State or any subdivision thereof, created or recognized by the laws of the United States or of any State, may be valid against the trustee even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition * * *."

In the *Bradley* case, *supra*, the Court was faced with the competing claims of the federal tax lien and an earlier arising state lien. The Court said that the bankruptcy statutes do not provide an answer as to which lien is prior. The Court said that the bankruptcy statutes provide a scheme of distribution which is "exclusive of the incompatible order of priority provided for nonbankruptcy liquidations in Sec. 3466."

Since the priority of the United States under Sec. 3466 didn't apply, and neither the bankruptcy statutes nor the statutes creating the liens provided any guidance as to priority, the Court applied the principle of "first in time, first in right." It refused to apply the strict choateness tests of Sec. 3466 and said that because the State lien attached to all of the property of the debtor, didn't render the lien inchoate. The liens were considered to be no more inchoate than the federal tax lien. To the same effect is *Adams* v. *O'Malley* (1950), 182 F. 2d 925; *United States* v. *Sampsell* (1946), 153 F. 2d 731; *In re Taylorcraft Aviation Corporation* (1948), 168 F. 2d 808.

The United States contends that the underlying reasons for granting priority in insolvency cases apply equally to tax lien cases where no insolvency is involved.

This policy, as expressed in R.S. 3466 and now 31 U.S.C. 191 is:

> "to secure an adequate revenue to sustain the public burdens and discharge the public debts."
>
> *United States* v. *The State Bank of North Carolina* (1828), 6 Peters 29.

Since Congress has provided a lien system to "assure the collection of federal taxes," *Glass City Bank* v. *United States* (1945),

326 U.S. 265, 267, the argument is that the same principles apply in tax lien cases as in insolvency cases. Ignored is the fact that the language of the statutes is considerably different and that if Congress had wanted to provide for federal priority in tax lien cases, it would have said so. It must be remembered that the priority of the United States is not based upon any prerogative as a sovereign but "is exclusively founded upon the actual provisions of their own statutes." *United States* v. *State Bank of North Carolina, supra.*

There is nothing unusual about treating a secured claim differently than an unsecured claim in view of the language of the insolvency statute. As stated heretofore, it is questionable whether any claimant can withstand the impact of the insolvency statute.

The United States cites *United States* v. *Security Trust & Savings Bank, supra,* as authority for application of the same principles in both types of cases. The facts of that case were considerably different than the case at hand, for that involved an attachment by a private creditor.

The basic reason for the Court's decision was that the fact and amount of the lien were unsettled there until judgment, for "numerous contingencies might arise" subsequent to the attachment which would prevent the creditor from obtaining a judgment. The language about applying a similar rule as had been applied in insolvency cases was unnecessary. Furthermore, in view of what the Court said later in *New Britain, supra,* it could not mean more than that under the facts of that case, a competing lienor would not be given priority. Finally, the numerous contingencies which could arise after attachment in a suit between private parties would not arise when a tax assessment is based on the return of the taxpayer.

The United States argues that the significant factor in the Court's giving priority to certain of the city tax liens in *New Britain* is the fact that the city liens were considered specific. However, the Court indicated it made no difference whether one set of liens was specific and the other general, *supra,* p. 84. If the federal lien is general and perfected, then the identical Vermont lien must also be so, and there is no justification for applying a double standard.

In *New Britain,* the Court was concerned with a state affecting the "standing of federal liens, simply by causing an inchoate lien to attach at some arbitrary time even before the amount of the tax, assessment, etc., is determined." *Supra,* p. 86. Here there

is no such concern for the amount has been established. Certainly, it cannot be argued that the state lien arose at an arbitrary time, when the language of the statute creating it is identical to the federal statutory provision.

None of the cases of this Court preclude the Vermont lien from prevailing here.

The attachment and garnishment cases are inapplicable where "numerous contingencies might arise that would prevent the lien from ever becoming perfected by a judgment awarded and recorded." *United States* v. *Security Trust & Savings Bank, supra*, p. 50. Also see *United States* v. *Acri* (1955), 348 U.S. 211; *United States* v. *Liverpool & London Insurance Co.* (1955), 348 U.S. 215.

Distinguishable also are the mechanics' lien cases: *United States* v. *Colotta* (1955), 350 U.S. 808; *United States* v. *White Bear Brewing Co.* (1956), 350 U.S. 1010; *United States* v. *Vorreitter* (1957), 355 U.S. 15; *United States* v. *Hulley* (1958), 358 U.S. 66.

In the *Vorreitter* case, the federal tax lien arose prior to the contracts giving rise to the mechanics' lien and in the *Hulley* case it appears that the federal tax lien arose before construction began.

In all of these cases the fact and amount of the lien can be uncertain until judgment. The "numerous contingencies" referred to in *Security Trust* could arise between the time of the filing of the lien and the outcome of a suit to enforce same. In other words, the taxpayer can assert any number of defenses to the suit brought by the lienor. Apparently, this is the view taken by the Court. As indicated previously, the same reasoning does not apply where the State brings suit to enforce a lien arising out of admitted liability of a taxpayer.

In *United States* v. *Scovil* (1955), 348 U.S. 218, the landlord's distress lien was subordinate to the federal tax lien because it didn't take effect until a distress warrant was issued—long after the federal lien took effect.

United States v. *Ball* (1958), 355 U.S. 587, is not in point. In that case the question was whether an assignment made by a subcontractor to a surety was a mortgage under 26 U.S.C. 3672. The Court said it was not.

Neither *United States* v. *Buffalo Savings Bank* (1963), 371 U.S. 228, nor *United States* v. *Pioneer American Insurance Co.* (1963), 374 U.S. 84, strengthen the position of the United States. *Buffalo Savings* involved a circuity problem and the local tax liens attached subsequent to the federal tax lien.

Pioneer American holds that a mortagee's lien for an attorney's fee is subordinate to a federal tax lien when, at the time the latter is filed, the fee is uncertain in amount and yet to be incurred. The Court also cited *United States* v. *Ball* as holding that an assignee's or mortgagee's lien to secure future indebtedness of the taxpayer is subordinate to a federal tax lien intervening prior to the incurring of the liability. It is true that the Court referred to the choateness doctrine in determining what amounts under the mortgage would take priority over the federal lien. Again the Court showed concern that a state might be able to cause "an inchoate lien to attach at some arbitrary time, even before the amount of the tax, assessment, etc., is determined." P. 774-775. Again, we emphasize that there is no such danger where, as here, the lien arises pursuant to statutory language identical to that set forth in the federal statutes and where the amount of the lien is established. The situation is far different from that in *Pioneer American* where the issue was whether a mortgagee can claim a lien for possible future indebtedness—for amounts which were not yet incurred and which were uncertain at the time the federal tax lien was filed. Nor does this in any way indicate that the Court will apply the rules of choateness as strictly in non-insolvency cases as in insolvency cases.

Since we have two competing tax liens which are identical in every respect with the State's lien first at every stage of the proceedings, the State's lien should prevail. To hold otherwise would be contrary to the long-established principle of lien priority, "first in time, first in right," a principle which was universal even in the days of Chief Justice Marshall. To say that the federal lien is choate and perfected at the time of assessment, even though steps must be taken to enforce it, and then to say that an identical state lien is inchoate because steps must be taken for its enforcement is to impose an unjustifiable double standard. The revenue needs of the federal government do not justify such a double standard and there is no evidence Congress ever intended same. Certainly, there is nothing in the language or history of the tax lien statutes to indicate this. In fact, the evidence is that Congress does not consider the revenue needs of the federal government so paramount as to cause the needs of the states and municipalities to be ignored. Although priority has been conferred upon the United States by statute in insolvency cases, in bankruptcy cases the tax claims of the federal government and the states have equal status. Again, if Congress had considered uniformity necessary, it would have

said so. As long as the state tax lien arises in the same manner as the federal lien, and therefore is not arbitrarily created, the United States cannot be hampered by lack of uniformity. Under circumstances such as these, the federal tax lien should be treated no better and no worse than the state tax lien.

In this day and age, the tax collections of the states are in far greater need of protection than are those of the federal government with its broad sources of revenue and the states should not be arbitrarily frustrated in their efforts by departures from the longstanding rule of priority.

If Vermont cannot prevail in this case, it is to say that even where no insolvency is involved and where no federal priority is established by statute, no lienor can prevail over the federal tax lien.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

26 USCA section 6321.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

26 USCA section 6322.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

26 USCA section 6323.

(a) Invalidity of Lien Without Notice.—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate * * *.

Title 32 VSA section 5601.

It is hereby declared that the purpose of this chapter, in addition to the essential purpose of raising revenue, is to conform as closely as may be with the internal revenue code in order that the filing of returns may be simplified and the taxpayers' accounting burdens may be reduced.

Title 32 VSA section 5765.

If any employer required to deduct and withhold a tax under section 5761 of this title neglects or refuses to pay the same after demand, the amount, including interest after such demand, together with any costs that may accrue in addition thereto, shall be a lien in favor of the State of Vermont upon all property and rights to property, whether real or personal, belonging to such employer. Such lien shall arise at the time the assessment and demand is made by the commissioner of taxes and shall continue until the liability for such sum, with interest and costs, is satisfied or becomes unenforceable. Such lien shall be valid as against any

subsequent mortgagee, pledgee, purchaser or judgment creditor when notice of such lien and the sum due has been filed by the commissioner of taxes with the clerk of the town or city in which the property subject to the lien is situated, or, in the case of an unorganized town, gore or grant, in the office of the clerk of the county wherein such property is situated. * * *

United States Constitution.

Amendment X. [Powers reserved to the states.]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.